

DIVISIONS III and IV

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOHN B. ROBBINS, JUDGE

CA 05-528

JUNE 14, 2006

STEPHEN LEE COLE, JOEY ALLEN  
COLE, WILLIE HARRISON, and  
GLORIA B. HARRISON  
APPELLANTS

APPEAL FROM THE SEVIER  
COUNTY CIRCUIT COURT  
[NO. CV-03-50]

HONORABLE CHARLES A.  
YEARGAN, JUDGE

V.

DAVID R. CLAY and KAREN A. CLAY  
APPELLEES

REVERSED AND REMANDED

This appeal concerns a boundary-line dispute between neighbors in rural Lockesburg, Arkansas. Both parties appeal the entry of an order on January 24, 2005, by the Sevier County Circuit Court that set a north/south property line between them. We reverse and remand.

Appellees are David Randall Clay and Karen Clay (collectively “Clay”), and appellants are Stephen Lee Cole, Joey Allen Cole, Willie Harrison, and Gloria B. Harrison, (collectively “Cole”). The Clay property is west of the Cole property. Both parcels are bordered along the north side by Highway 317. A roadway known as “Cole Drive” runs in a southerly direction from Highway 317, in the general vicinity of the borderline where each neighbor believed they owned the land. Clay and Cole used and sporadically assisted in the

maintenance of Cole Drive over the years. There was no dispute until the spring of 2003, when Clay took down the fence on the west side of Cole Drive and sought to erect a fence along the east side of Cole Drive. Clay believed that a survey showed his property line to lay just to the east of Cole Drive and that another fence had existed at that east-side location for many years past. Cole objected and filed suit, petitioning for a temporary restraining order to prohibit Clay from fencing across the existing road or taking possession of Cole's land. Clay counter-petitioned for a temporary restraining order prohibiting Cole from harming or threatening Clay while re-constructing the east-side fence on Clay's property. Clay also filed a counterclaim for the cost of boarding his cattle during the pendency of this suit while being denied access to his property.

After hearing the matter, the trial judge viewed the subject property. Thereafter, the trial court entered the order on appeal, which declared in pertinent part that Clay's property line would be established at the northwest corner of Cole Drive south of Highway 317 and follow along the location of the fence that existed prior to its removal by Clay, running south along the west side of Cole Drive for 300 feet, then turning east and crossing Cole Drive onto its east side, two feet from the gravel of the road, and proceeding 762.01 feet south to the southeast corner of that section of land. The judge stated that Cole Drive had been subject to unfettered use for more than thirty years and that Cole would be entitled to use Cole Road for ingress and egress of the property; both parties were given responsibility for upkeep of the road. Both parties filed notices of appeal.

Cole argues that the trial court's order is clearly erroneous to the extent that the trial court moved the boundary line to the east side of Cole Drive. Cole asserts that the proof established that the entirety of the boundary was the west-side fence, Cole having acquired title through adverse possession or acquiescence. In opposition, Clay argues that the trial court's order is clearly erroneous because the proof established that the boundary was along the surveyed line that coincided fully with the east-side fence. Clay additionally asserts that the trial court erred in permitting Cole use of the roadway that exists within Clay's property.<sup>1</sup>

Although boundary line cases are reviewed de novo on appeal, we will affirm a trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). A finding is clearly erroneous when, although there is evidence to support it, after considering all of the evidence we are left with the definite and firm conviction that a mistake has been committed. *Id.* Whether a boundary line by acquiescence or by adverse possession exists is to be determined upon the evidence in each individual case. *Id.*

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<sup>1</sup>Although the judgment of the trial court declaring the location of the boundary between the parties' respective properties exceeds the relief actually sought in the pleadings before the court, it appears that the boundary-line issue was tried by the implied consent of the parties and that the pleadings were amended to conform to the proof. *See* Ark. R. Civ. P. 15(b); *Matter of Tucker*, 46 Ark. App. 322, 881 S.W.2d 226 (1994). Neither party contends on appeal that the trial court tried issues not pleaded, but rather both parties argue the merits of the trial court's decision. Therefore, we address the merits.

Boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question and may be affected by principles of acquiescence and adverse possession. A fence, by acquiescence, may become the accepted boundary even though contrary to the survey line. The general rule is that, when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Tull v. Ashcraft*, 231 Ark. 928, 929-30, 333 S.W.2d 490 (1960). In *Kittler v. Phillips*, 246 Ark. 233, 236, 437 S.W.2d 455, 456 (1969), it was noted that to establish a boundary line by acquiescence there must be a mutual or expressed agreement of the dividing line. However, even if there never was any express agreement to treat the fence as the dividing line between the two parcels of land, such an agreement may be inferred by the action of the parties. *Id.* Stated differently, tacit acceptance of a fence line or other monument as the visible evidence of the dividing line for a long period of time manifests apparent consent. *See Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). The property owners and their grantees are then precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although it may not be on the survey line. *Id.*

The first witness to be called to testify at the trial was appellee Randall Clay. He testified that there had been a fence on each side of the roadway for many years but that the east-side fence fell down in the early 1980s, although there were still remnants of it. Clay was in his early fifties at the time of the trial. Clay believed he owned all the land including

the roadway up to the old east fence line because it comported with the survey rods. Explaining his actions in April 2003, Clay said he intended to erect a fence back along the east side of the road and take down the west side fence so that he could use the entirety of his pasture land. Clay said he had given appellant Stephen Cole permission to use the road as long as he helped maintain it. Clay explained that the road was named Cole Drive by the 911 operators.

Clay said that he wanted to re-fence the property and place a new gate along the road so that his cows would not wander onto the highway. Clay said he had paid taxes on the land, which he believed would include the road and three feet to the east side of the road, in line with the eastern fence. Clay did not believe that Cole Drive had ever been a county road. He said he bush-hogged the property to the east of the road, and he graded the road for years. He agreed that Cole told him not to drive heavy trucks on the road, but he did not think Cole owned it. Clay testified that the issue was not with the road but with the fence.

Clay testified that the fence on the west side had been there since the 1960s, and it was “redone” in 1982. Even though the western fence was in existence, Clay did not think that this suggested that he was relinquishing his rights to the property over the roadway and to the east.

Karen Clay, Randall Clay’s wife, testified that she helped reconstruct the west-side fence back in 1982, which was only erected for safety, not to establish a boundary line. Herman Clay, who sold the property to Randall Clay, testified that he had long remembered there being fences on either side of the roadway. Ronnie Clay, Randall Clay’s brother,

testified that he remembered there being two fences, one on either side of the road, for many years.

Appellant Stephen Cole testified that his family had owned the land at issue east of Clay for at least two generations, back to the 1920s, and he was well familiar with the history of its use. Cole said that Cole Drive had been in existence his whole life. Cole remembered that his family used the road to access their homes and still did. He recalled that the fence on the west side of the road was there his whole life; he did not ever remember a fence on the east side of the road. He said he never asked permission to use the road; he and his family just used it. Cole brought a home movie to trial, showing him as a child riding a horse along the road, and the fence on the west side was visible. Cole wanted the western fence put back where it was and for Clay to remove the posts he had placed on the east side of the road because he believed it to be his family's land. Cole said he regularly mowed and bush-hogged the area up to the road and was hampered by Clay's interference. Cole had not seen the surveys that Clay said he had performed, but Cole believed his family owned the land all the way up to the road and that he had paid taxes on his land, which he thought included the road. Cole believed the surveys were faulty. Cole agreed that he had suggested to Clay that Clay not use heavy equipment on the road so as not to cause damage to it.

Robin Cole, Stephen's wife, testified that she had lived in the area for fifteen years and that there had always been a full fence on the west side of the road. She said that the Cole family and their relatives had always exercised control over all the property east of the roadway. Although there was a newer, more cosmetic road installed further east on the Cole

property to access the houses, it flooded easily, such that the old Cole Drive was the most reliable means of ingress and egress.

Delores Cole, Stephen's mother, testified that she was presently sixty-four years old. She recalled that her parents moved there when they married in the late 1920s, and the fence on the west side of Cole Drive had been there ever since. Delores remembered that at one time there was part of a fence on the east side of the road, but she did not think it was a complete fence but rather bits and pieces that her father had put in place many years before near their home. This house was the one she was raised in, and it sat in the northwestern corner of the land, nearest the highway.

Appellant Willie Harrison, Delores Cole's brother, testified that he and his wife owned five acres on the family land, and it was in the southwestern corner, abutting Cole Drive and lying east of Clay's land. Willie was seventy years old and remembered that Cole Drive was originally a county road that went further back, but it was abandoned in the depression. Willie recalled that his father and Clay's predecessor in title erected the western fence and a partial fence on the east side of the road. He thought that the eastern fence deteriorated in the mid-1960s. Willie said he had always used Cole Drive as virtually the only access to his property. Willie believed that the boundary line was the road itself. Willie said that the western fence was there for as long as he could remember. Willie did not deny that he had hit Clay with his cane when they were arguing about Clay's building a fence on the east side.

At the end of the proceeding, the trial judge agreed that he would physically inspect the premises, review the documents and exhibits, and issue a ruling. The inspection of the premises was not recorded, by agreement of the parties. The order on appeal followed. In the order, the judge declared that the original fence line on the west side of the road would be the boundary line, proceeding due south 300 feet, then moving to the east side of the road, allowing for an east-sided fence to be placed two feet from the eastern edge of the road, then running 762.01 feet to a survey rod. The order further commanded Clay to install cattle guards where the boundary line crossed Cole Drive and at the end of Cole Drive. The order also recognized Cole's right to the use of Cole Drive. This appeal followed.

As a preliminary matter, Cole moved to strike Clay's Statement of the Case included in Clay's appellate brief because it includes two drawings not part of the record made at trial and which do not precisely reflect the placement of the fences or the configuration of Cole Drive. Cole also filed a companion Motion for Sanctions, which seeks a \$450 attorney fee and \$25 in costs to be imposed against Clay as a consequence of having to prepare the Motion to Strike. The Statement of the Case is intended to give our court a general factual understanding of the case and the action taken by the trial court. Ark. Sup. Ct. R. 4-2(a)(6) (2005). We discern no intent to violate this Rule, and we believe that Clay acted within the spirit of it. We deny appellant Cole's Motion to Strike appellee Clay's Statement of the Case. The Motion for Sanctions is likewise denied. *Compare Daley v. Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992).

To the merits of the appeal and cross-appeal, Cole contends that the trial court clearly erred in finding that the boundary was broken into two parallel and un-joined fences, several feet apart. Cole contends that the fence on the west side of the road, which has been in existence for decades by all the testimony, is the true north/south boundary either by adverse possession or acquiescence. Clay contends that the trial court erred in not establishing the boundary line completely along the eastern fence line, which Clay contends is consistent with his surveys. Without explanation of legal theory or equitable principles applied, and without reconciling an apparent inconsistency in its credibility determination, the trial court held that after following this fence line south for 300 feet, the boundary line then shifts perpendicularly across Cole Drive to a point two feet east of the road bed and thence south 762.01 feet to the southeast corner of the West  $\frac{1}{2}$  of the SW  $\frac{1}{4}$  of Section 36, Township 9 South, Range 30 West. There is simply no basis in the evidence before the trial court to support such a holding, and it is clearly erroneous. While we may decide an equity case on de novo review, we may also remand to the circuit court for further proceedings where we cannot plainly see what the rights and equities of the parties are, such as when the decision to be made depends largely upon the evaluation of the credibility of the witnesses and the weight to be accorded their testimony. *Rigsby v. Rigsby*, 346 Ark. 337, 57 S.W.3d 206 (2001); *Lynch v. Brunner*, 294 Ark. 515, 745 S.W.2d 115 (1998).

Consequently, because we cannot reconcile the trial court's findings and cannot glean from the court's order how it evaluated the credibility of the witnesses or what weight it

afforded the evidence, we reverse and remand for the circuit court to consider the issues tried before it and to make findings of fact and conclusions of law.

Reversed and remanded.

GLADWIN, GLOVER, VAUGHT, and CRABTREE, JJ., agree.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. I concur in our decision to reverse and remand this case so that the circuit court may consider the issues tried before it and make findings of fact and conclusions of law. I caution, however, that neither our recitation of only some of the testimony nor our discussion of certain legal theories is meant to indicate that we are either making findings of fact and conclusions of law or suggesting what those findings and conclusions should be.

Further, this case turns on what theories were tried by the parties and considered by the circuit court. Appellants never pled adverse possession or boundary by acquiescence, never mentioned the theories at trial, and never moved to have the pleadings conform to the proof. Similarly, appellees never pled that the survey established their boundary or asked that the pleadings be conformed to the proof. And in its order, the court did not refer to any of these theories. On remand, the court should consider what theories were tried before it on the boundary-line issue, i.e., adverse possession, boundary by acquiescence, prescriptive easement. Even though Rule 15(b) of the Arkansas Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, the issues are treated as if they had been raised in the pleadings, we will not, however, imply

consent to conforming the pleadings to the proof merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one. *McEntire v. Watkins*, 73 Ark. App. 449, 43 S.W.3d 770 (2001).